Nos. 426-441

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In the Supreme Court of the United States

OCTOBER TERM, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

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EST. B. F. DAVIS, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

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BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* WILBUR SUCHARD CHOCOLATE CO.

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BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER, *v.* YORK CHOCOLATE CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 426

B. D. McCAUGHN, COLLECTOR, PETITIONER

v.

HERSHEY CHOCOLATE CO.

(Also Nos. 427–441, the titles of which are set out on the cover of this brief)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court (R. 20)[1] is not reported. The opinion of the Circuit Court of Appeals (R. 92) is reported in 42 F. (2d) 408.[2]

[1] Unless otherwise specified, all references in this brief are to the record filed in Nos. 426 to 431. The four records are very similar. The District Court disposed of all of the cases in one opinion. It adopted its statements of fact in the opin-

JURISDICTION

The judgments sought to be reviewed were entered June 6, 1930. (R. 98.) Petitions for certiorari were filed on September 6, 1930, and were granted on October 20, 1930. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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ion as findings of fact, and, in addition, granted certain requests for findings of fact made by the plaintiffs. (R. 16.) The vital facts are the same in all of the cases, although there is, of course, some difference between findings made in pursuance of requests of the different respondents, and the pleadings and the testimony are not exactly the same in all of the cases.

The District Court first filed an opinion on November 22, 1928. (R. 9.) After a reargument it filed an opinion dated January 17, 1929, making certain corrections in its original opinion (R. 17), and on January 22, 1929, it filed a completely new revised opinion (R. 20). Two of these three opinions of the District Court are also printed in the bill of exceptions—i. e., the opinion of November 22, 1928 (R. 69) and the opinion of January 17, 1929 (R. 77). Each of these opinions applies to all of the cases.

The Circuit Court of Appeals rendered but one opinion for all of the cases. (R. 92.)

By stipulations filed in the Circuit Court of Appeals under date of July 5, 1929, in five *Hershey cases*, Nos. 4158 to 4162, inclusive, it was agreed that the decisions in those cases should be controlled by and conform to the ultimate decision in case No. 4157. (R. 99–103.) It was further agreed by stipulations of the same date that three *Klein cases*, Nos. 4163 to 4165, inclusive, should follow the ultimate decision in No. 4166 (Klein R. 100); that two *Wilbur cases*, Nos. 4167 and 4168, should follow No. 4169 (Wilbur R. 95); and that two *York cases*, Nos. 4170 and 4171, should follow No. 4172 (York R. 92).

QUESTION PRESENTED

Is the excise tax imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 on "candy" sold by the manufacturers applicable to sweet chocolate and sweet milk chocolate in blocks, bars, and small pieces, suitable for consumption sold by the manufacturers to be retailed in candy and other stores?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 31–38.

STATEMENT

The four respondent manufacturing corporations brought suits in the United States District Court for the Eastern District of Pennsylvania to recover amounts aggregating about $8,000,000 paid as excise taxes under the provisions of Title IX, Section 900 (9) of the Revenue Act of 1918, and Title IX, Section 900 (6) of the Revenue Act of 1921, on the sale by respondents of sweet chocolate and sweet milk chocolate in various forms and sizes. The taxes were paid monthly over a period beginning in 1918 and ending in 1924. Since different individuals held the office of Collector of Internal Revenue during the period involved, sixteen separate suits were filed by respondents and are referred to in the record of the cases docketed in the Circuit Court of Appeals, as follows:

	In circuit court of appeals	In this court
Hershey v. McCaughn	[1] No. 4157	No. 426
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Hershey v. Lederer	4160	429
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Wilbur v. Lederer	4167	436
Wilbur v. Lederer	4168	437
Wilbur v. McCaughn	[1] 4169	438
York v. Davis	4170	439
York v. Lederer	4171	440
York v. McCaughn	[1] 4172	441

[1] Cases for which printed records were prepared and filed.

The sixteen cases were tried together in the District Court. Written stipulations waiving a jury were filed. (R. 9.) The District Court made special findings of fact and conclusions of law, holding that "sweet chocolate" and "sweet milk chocolate" manufactured and sold by the respondents were "candy" within the meaning of the applicable statutes. (R. 16–17.) Statements of fact in its opinion, which the court adopted as findings of fact, included the following (R. 21):

> The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and

> shapes, usually attractively dressed up and offered under various names. * * * One of the plaintiffs describes the article as a "confection" in some of its labels and display matter.

The record also shows that sweet chocolate of the kind upon which the taxes were paid is consumed in the same manner as candy; that it is eaten in small quantities from the hand as a sweetmeat; that it is wrapped and sold in attractive packages in bars, blocks, and small pieces of various sizes and shapes (sometimes containing nuts); and that such packages were given names which would appeal to candy consumers. (R. 49–62.)

The evidence discloses that the Hershey Chocolate Company manufactured and advertised certain of its products as "Milk-Maid Sweet Chocolate Kisses," "Silver Tops," "Sweet Milk Chocolate Batons," "Homestead Gems," "Souvenirs," "Sunny Boys," "Chocolate Delights," "Fifty-Fifty Almond Bars," "Bon Bons," "Neopolitans," "Croquettes," etc. (R. 49, 50.) In the advertising matter distributed by the Hershey Company these terms were elaborated upon in many instances, one example being "Exhibit O" (R. 50; Exhibit not printed), where the words, "Hershey's Kisses Are Delicious" appear; and upon other labels in which the small Almond Bars are wrapped appear the phrase, "A Sweet to Eat."

The Wilbur-Suchard Chocolate Company from the outset designated itself as a manufacturer of

chocolate confectionery. Its trade-mark included the words "Solid Chocolate Confections." This company also manufactured a household chocolate and cocoa. No tax was imposed on that product. The smaller packages of its sweet chocolate and sweet milk chocolate upon which the tax was paid bore labels appropriate to the candy trade. Certain of its products were designated as "Wilburmilk," "Wilbur Buds," "Milk Chocolate Almond Bars," "Sweet Milk Chocolate Pats," "Velour Chocolate," "Superfine Milk Bon Bons," "Vanilla Bon Bons," "Fine Vanilla Sweet Chocolate Fancy Shapes," "Cameos," "Ceylon Wafers," "Chocolate cigarettes," "Gold Medal Water," "Almond Wilburmilk," "Honey Dew," etc. (Wilbur R. 62; Exhibits not printed.) (See also Hershey R. 21.)

The District Court rendered judgments in favor of the petitioners. (R. 84.) Upon appeal, the judgments were reversed by the Circuit Court of Appeals for the Third Circuit. (R. 92, 98.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 upon "candy" sold by the manufacturer were not applicable to the sweet chocolate and sweet milk chocolate manufactured and sold by respondents in various forms and sizes.

(2) In holding that the regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, classifying sweet chocolate and sweet milk chocolate as "candy" within the meaning of those sections of those Acts, were unauthorized by law.

(3) In holding that respondents were entitled to recover the excise taxes paid by reason of the manufacture and sale of sweet chocolate and sweet milk chocolate in various forms and sizes.

SUMMARY OF ARGUMENT

I

Section 900 of each of the applicable Revenue Acts (that of 1918 and that of 1921) imposes an excise tax upon "candy" sold by the manufacturer. The respondent taxpayers were all manufacturers. The taxes here involved were assessed on sales of sweet chocolate and sweet-milk chocolate in various kinds of small pieces, usually attractively dressed, of the kind commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores. The only question is whether these products were "candy" within the meaning of the statutes. The word occurs in a paragraph by itself and is evidently a comprehensive term intended to describe a class of articles. It is not defined in the act, and nowhere has Congress ever attempted to define the word "candy." None of the law dictionaries mentions the word. The standard dictionaries give definitions of "candy"

which are broad enough to include the articles in question. Applying the test of construing statutory words in their ordinary and usual sense, we conclude that candy includes the products in question.

Anyway, such a construction is an admissible one. Consequently the Treasury Department had authority to adopt it. And it has consistently adopted it in regulations which were promulgated soon after the passage of the 1918 Act and which had been continued under that Act and the 1921 Act up to the present time. This administrative construction was expressly approved in the only case other than the instant cases which has considered the regulations as applied to sweet chocolate. *Malley* v. *Walter Baker & Co.*, 281 Fed. 47 (C. C. A. 1st, 1922). The regulations construing the word "candy" have also been upheld as applied to certain popcorn products in three cases decided by the Court of Claims, in all of which this Court denied certiorari. If the decision of the Circuit Court of Appeals in the instant case is correct, it would seem obvious that all of these decisions were wrong, and an affirmance of the instant decision would result in upsetting the consistent administrative practice which has been followed for years. The case is consequently one which calls for the application of the principle that an administrative construction of tax statutes should not be upset unless plainly wrong. Moreover, the statutory provision in question was reenacted in the Act of 1921, after the

regulation had been in effect for more than two years, and this reenactment is evidence of legislative approval of the regulation.

II

We submit that nothing in the legislative history of the 1921 Act shows that Congress did not intend the excise tax to apply to sweet chocolate. The Circuit Court of Appeals found some support for its decision in "an examination of the record of deliberations and discussion in the Committees and also upon the floor of the Senate when the 1921 Act was under consideration." We submit that it was improper to consult most of these sources at all, and anyway that they do not show that Congress understood that the tax did not apply to sweet chocolate.

III

The Tariff Acts do not show that "candy" may not include sweet chocolate. The Circuit Court of Appeals held that because chocolate was made the subject of a separate duty from candy in earlier Tariff Acts it must be presumed that when Congress imposed a tax upon "candy" in the Revenue Act of 1918 it intended to exclude sweet chocolate and sweet milk chocolate. The Tariff Acts, however, do not show that Congress has made a sharp distinction between "candy" on the one hand and "chocolate" on the other. The duties prescribed by these Acts are laid without exception on "sugar candy" and generally, as in the Tariff Acts of 1909,

1913, and 1922, the phrase is "sugar candy, and all confectionery not specially provided for in this section." By another paragraph in the same section the tax is laid on the importation of "chocolate" of all kinds. Where Congress in a Tariff Act uses two terms in classifying property subject to duty, one general and the other specific, articles answering the specific description will, of course, be subject to the duty imposed by the specific language. But it does not follow that if chocolate had not been specifically mentioned it would not have been subject to the duty laid by the more general paragraph taxing "sugar candy, and all confectionery not specially provided for in this section." Furthermore, the purposes sought to be accomplished by the Tariff Acts were different from those sought through the excise taxes imposed by the Revenue Acts of 1918 and 1921. There was reason for imposing one rate of duty on products composed chiefly of sugar, which is produced in the United States, and another rate on products composed chiefly of chocolate, which is not. No reason exists for excluding from an excise tax which includes candy generally those forms of candy composed largely of chocolate.

IV

The circulars of the Department of Agriculture throw no light upon the meaning of the word "candy" in the Revenue Acts of 1918 and 1921. The circulars upon which the respondents rely were

promulgated under authority of the Act of June 3, 1902, which made an appropriation "to enable the Secretary of Agriculture * * * to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice." The definitions made in the circulars issued under this Act are consequently made for the purpose of establishing standards of purity in foodstuffs, and the classifications made thereunder are directed solely to that end. There is no indication whatever in the statute that the Secretary of Agriculture should have power to define what is or is not "candy" for any purpose, and the Revenue Acts contain no reference to his classifications.

ARGUMENT

I

THE WORD "CANDY" AS USED IN SECTION 900 (9) OF THE REVENUE ACT OF 1918 AND SECTION 900 (6) OF THE REVENUE ACT OF 1921 INCLUDES THE SWEET CHOCOLATE AND SWEET MILK CHOCOLATE WHICH WAS TAXED IN THESE CASES

The two applicable Revenue Acts, Section 900 (9) of the 1918 Act and Section 900 (6) of the 1921 Act,[2] provide:

> That there shall be levied, assessed, collected, and paid upon the following articles

[2] The entire texts of Section 900 of each of the two Acts are printed in the Appendix, pp. 31–34, *infra*, in parallel columns, so as to show the differences between the two Acts. There is no difference in the provisions relating to candy except the rate.

sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased * * *:

Candy [5 per centum in the 1918 Act and 3 per centum in the 1921 Act].

The taxes here involved were assessed on articles sold by the respondents, who were all manufacturers. The articles sold were of the kind commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores, etc. The articles were bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed. They were offered under various names, some of which are mentioned on pp. 5–6, *supra*. Department stores sell these articles in their candy departments.

The only question involved in these cases is whether these products, which were sweet chocolate and sweet milk chocolate, were "candy" within the meaning of the provisions of the statutes quoted above. We maintain that they were.

In each of the above Acts the word "candy" appears by itself in a separate subparagraph. It is not, like some of the other articles taxed, merely one item in a detailed list of related products, and the Act contains no definition of the word. The fact that the word is not qualified and that it does not appear merely as part of a detailed enumeration of related articles indicates that it was

intended as a comprehensive term to describe a class of articles.

Never has Congress attempted to define the word "candy."[3] None of the law dictionaries, as far as we are aware, mentions the word.[4] The standard dictionaries give definitions of "candy" which are broad enough to include the articles in question.

Among them are the following:

Century Dictionary & Encyclopedia:

A solid preparation or confection of sugar or molasses, or both, boiled, inspissated, and worked by pulling to a crystalline consistence, either alone or combined with flavoring and coloring substances; hence, any confection having sugar as its basis, however prepared.

Webster's New International Dictionary:

A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystalizing, molding, or working it into the required shape. It is

[3] A discussion of the use of the word in the Tariff Acts appears at pp. 24–28, *infra*. See pp. 28–30, *infra*, for the use of the word by the Department of Agriculture.

[4] It does not appear in any of the following: Bouvier's Law Dictionary, Black's Law Dictionary, Sweet's Law Dictionary, Burrill's Law Dictionary, Tomlin's Law Dictionary, Georgia Words & Phrases by Ryman, Abbott's Law Dictionary, Rapalje & Lawrence's Law Dictionary, Winfield's Adjudged Words and Phrases, Anderson's Dictionary of Law, McCulloch's Commercial Dictionary, Burn's Law Dictionary, Jacob's Law Dictionary, English's Dictionary of Words and Phrases, Lawson's Concordance, Stroud's Judicial Dictionary.

usually flavored, or colored, and often contains fruit, nuts, etc. Also any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery. *Standard Dictionary:*

Sugar or molasses, or both, formed into a confection by any means, but usually by boiling. Candy, which is made into a great variety of forms, is generally flavored and often colored with various substances, and sometimes combined with nuts, chocolate, etc.

No evidence as to the use of the word in commerce or common speech was presented in the District Court. That court said (R. 24):

Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Although the Circuit Court of Appeals said (R. 94) that this "is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion," we submit that the District Court was correct.

Applying the test of construing statutory words in their ordinary and usual sense,[5] we conclude that "candy" includes the products in question.

Anyway, such a construction is an admissible one. Consequently the Treasury Department, which is charged with the enforcement of the law, had authority to adopt this interpretation.[6] And it has so construed it consistently from the date of the passage of the Act of 1918 until the present time.

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[5] *DeGanay* v. *Lederer*, 278 U. S. 378, 381. See also *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

[6] Section 1309 of the 1918 Act provided:

"That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

Section 1303 of the 1921 Act contains identical language. The Department's construction of the terms "parts" and "accessories" which occur in other paragraphs of the same section of the statute was upheld in *Universal Battery Co.* v. *United States*, 281 U. S. 580, 582. See also *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931.

The regulations promulgated by the Commissioner gave recognition to this limited scope of the statutes by excluding from the operation of the tax "bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste" and sweet chocolate which was not to be consumed in the form in which it was sold. It is conceded that the products as to which the taxes in question were paid do not come within these excluded classes. (R. 21.)

In holding that the products taxed were excluded from the excise tax on "candy," we submit that the Circuit Court of Appeals has taken from the Act "a great deal of utility and makes [the statute] miss its purpose." Cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 506.

Thus, on May 1, 1919, by Article 22 of Regulations 47 (pp. 34–35, *infra*) the Commisioner of Internal Revenue, with the approval of the Secretary of the Treasury, announced the following construction of the language:

> Candy within the meaning of the act includes * * * sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts.

This Article expressly excluded bitter chocolate "which needs the addition of sugar before it becomes pleasing to the taste." A revision of this Article in December, 1920 (*infra*, pp. 35–37), added to the Article a provision that candy—

> does not include * * * sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Article 19 of Regulations 47, promulgated under the 1921 Act on January 6, 1922 (*infra*, pp. 37–38), contained the same provisions in regard to sweet chocolate and sweet milk chocolate as did the previous regulations, as revised. This later regulation has been in effect at all times since the passage of the 1921 Act. The excise taxes imposed by Sec. 900 of the 1921 Act were repealed as of July 2, 1924, by Section 1100 (a) of the Revenue Act of 1924, 43 Stat. 253, 352.

This administrative construction of the word "candy" was expressly approved in the only case other than the instant case which has considered it. *Malley* v. *Walter Baker & Co.*, 281 Fed. 41 (C. C. A. 1st, 1922), reversing the District Court for the District of Massachusetts, whose decision is unreported.[7] The Court of Claims has upheld other provisions of the same regulations as applied to certain pop-corn products in *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, certiorari denied, 280 U. S. 579; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 98, certiorari denied, 280 U. S. 580; *Shotwell Manufacturing Co.* v. *United States*, 67 C. Cls. 152, certiorari denied, 280 U. S. 580.[8]

If the decision of the Circuit Court of Appeals in the instant case is correct, it is obvious that the decision of the Circuit Court of Appeals on this identical point in the *Baker case* in 1922 was wrong and that all of the taxes which have been collected from manufacturers of sweet chocolate in the past were wrongfully collected. On this hypothesis, it would also seem that all of the decisions of the Court of Claims above referred to were wrong and that all taxes which have been collected from manu-

[7] The entire opinion of the Circuit Court of Appeals in this case is printed as an appendix, pp. 43–53, *infra*.

[8] In *Funsten Co.* v. *United States*, 65 C. Cls. 292, the Court of Claims held that stuffed dates were not taxable as candy. They did not come within the definition of candy in the regulations.

facturers of the sort of products involved in them were wrongfully collected. An affirmance now of the decision below will result in upsetting the consistent administrative practice which has been followed for years and will result in according more favorable treatment to the respondents here than has been accorded to other similar manufacturers. The case is consequently one which calls for the application of the principle that an administrative construction of tax statutes should not be upset unless plainly wrong. See *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Brewster* v. *Gage*, 280 U. S. 327, 336, and cases there cited.

Moreover, the statutory provision in question was reenacted in the Act of 1921 after the regulations had been in effect for more than two years. The only change in regard to candy was a change in the rate. Certain other articles which had been subject to the excise tax provisions of the 1918 Act were omitted from the 1921 Act. (See pp. 31–34, *infra*.) This reenactment is evidence of legislative approval of the regulation. See *Brewster* v. *Gage*, 280 U. S. 327, 337, and cases there cited; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931.

II

NOTHING IN THE LEGISLATIVE HISTORY OF THE 1921 ACT SHOWS THAT CONGRESS DID NOT INTEND THE EXCISE TAX TO APPLY TO SWEET CHOCOLATE

The Circuit Court of Appeals found some support for its conclusion from "an examination of the record of deliberations and discussions in the committees and also upon the floor of the Senate, when the 1921 Act was under consideration." (R. 96.) It was apparently influenced by three matters which its examination revealed: (1) Statements made to the Ways and Means Committee of the House; (2) discussions on the floor of the Senate; (3) the fact that the Secretary of the Treasury submitted to the Committee a definition of the word "candy" which included sweet chocolate and sweet milk chocolate, with the suggestion that it might be incorporated in the law, and that this was not incorporated in the law.

We submit that none of these matters shows that either branch of Congress believed that in passing the Act of 1921 it was not taxing sweet chocolate. The outstanding, conclusive fact is that the Treasury Department had construed the word "candy" in the 1918 Act to include sweet chocolate and sweet milk chocolate, as is shown by the regulations above quoted. As this Court said in *National Lead Co. v. United States*, 252 U. S. 140, 147, "Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the

Government." There is no reason why the presumption should not apply in the instant case.

It is hardly likely that anyone thought that the Government would acquiesce in the decision of the District Court in Massachusetts, and if any members of Congress gave the decision any weight it is quite possible that they believed that the decision would be reversed—as it was.*

Statements to Committees and on the floor of the Senate should not be considered. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Lapina* v. *Williams*, 232 U. S. 90; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 209, 316–318.

The statements to the Committees were made by Hubert B. Fuller, an attorney representing various confectioners' associations. His plea was to have the tax on candy abolished entirely, and in the course of his remarks he referred to the decision of the District Court in Massachusetts. It is signifi-

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*As a matter of fact (as we have ascertained from an examination of the files in the Department of Justice and by communication with the Clerk of the District Court in Massachusetts), in July, 1921, the Department of Justice decided to appeal the case and the bill of exceptions was filed on July 5, 1921, which was before the bill which became the Act of 1921 came before either House of Congress. The appeal was not allowed until after the passage of the Act. None of these facts appear in the record, and there is no direct evidence that they were known to Congress. On the other hand, there is no evidence that members in charge of the bill did not know these facts.

cant that in the formal brief filed by the National Confectioners' Association at this time various articles are mentioned as competing with candy without being subject to the excise tax. In the list chocolate and sweet milk chocolate are not mentioned. (See Hearings on Internal Revenue Revision before the Committee on Ways and Means in 1921, pp. 244–258.)

The reports of the Committees contain no discussion of the matter.

An examination of the report of the debate on the floor of the Senate, upon which the court relied, shows that the member of the Committee in charge, Senator Penrose, gave no indication as to his opinion about the matter. Evidently some of the Senators believed that sweet chocolate was taxed as candy, but others did not. (Congressional Record, 67th Congress, 1st Session, Volume 61, part 7, pp. 7071–7075.) The situation presented here shows the futility of trying to ascertain the intention of Congress from the sources to which the Circuit Court of Appeals and the respondents have gone, and illustrates the wisdom of the rule laid down by this Court, that these matters are not a safe guide in ascertaining the purpose and meaning of the lawmaking body.

The court below was also influenced by the fact that suggestion had been made to the Ways and Means Committee through the Secretary of the

Treasury that the word "candy" should be defined in the Act so as to include the articles in question as well as a number of other articles. An examination of the communication to the Ways and Means Committee shows that no *recommendation* to this effect was made. The material to which the court referred was sent to the Chairman of the Ways and Means Committee on November 3, 1919, nearly two years before the Revenue Act of 1921 was passed. As appears from the letter of transmittal from the Secretary of the Treasury to the Chairman of the Committee,[10] the material transmitted was a compilation of suggestions "which have occurred to the various officers of the Internal Revenue Bureau, * * * with similar suggestions received from outside sources." These suggestions occupied over fifty printed pages.[11]

The letter of transmittal states, "This material is not in the form of recommendations by the department, as a decision has not yet been reached

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[10] A complete copy of the letter of transmittal appears in Appendix B. (Pages 39–40, *infra.*)

[11] This is evidently the material which was introduced in evidence by the taxpayers as Exhibit 11. (R. 44.) It is printed in the form of a pamphlet bearing the following caption:

"NOTES ON THE REVENUE ACT OF 1918, submitted by the Secretary of the Treasury, without recommendation at this time.

"Printed for the use of the Committee on Ways and Means, House of Representatives, Part I. Washington Government Printing Office, 1919."

with respect to all of the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them."

Nothing in the pamphlet shows that the Secretary of the Treasury recommended a change in the provisions relating to candy. As to this, the pamphlet states merely:

> Section 900 (9). Tax on candy: This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.
>
> It has been suggested that the term "candy" should be defined.
>
> The following definition of the term "candy" is suggested:
>
> Strike out subdivision (9) and insert: "Candy, 5 per centum. *Candy within the meaning of this subdivision* * * *" [Then follows a definition of candy substantially the same as that contained in the Regulations then in force. (Pages 34–35, *infra*.).]

The discussion of Sections 900 and 902 of the Act occupies six pages, and consists mostly of suggested definitions of various words occuring in the Act, such as "sculpture," "paintings," "bronzes," etc. None of these definitions was adopted in the Act of 1921. If all of them had been, the Act would have been materially lengthened.

There is no reason to believe that the Ways and Means Committee did not appreciate the fact that the articles mentioned in Sections 900 and 902 had been defined by regulations. Its failure to define

the various articles in the Act of 1921 would not seem to indicate disapproval of the existing definitions of the articles in the regulations, but rather to indicate approval of the existing system under which the matter of definition was left to regulations of the Treasury Department and also to indicate satisfaction with the definitions of those terms which had been promulgated by the Treasury Department in regulations. We consequently submit that the document upon which the Circuit Court of Appeals relies furnishes no support whatever for its conclusion that the Ways and Means Committee intended to exclude sweet chocolate and sweet milk chocolate from the excise taxes which were laid generally on "candy."

III

THE TARIFF ACTS DO NOT SHOW THAT "CANDY" MAY NOT INCLUDE SWEET CHOCOLATE

The Circuit Court of Appeals felt that the fact that chocolate was made the subject of a separate duty from candy in earlier Tariff Acts, is convincing proof that when Congress placed a tax upon "candy" in the Revenue Act of 1918 it intended to exclude sweet chocolate and sweet milk chocolate. We submit that the court below erred in giving such effect to the use of the words in the earlier tariff laws.[12] We do not deny that tariff

[12] References to numerous Tariff Acts are given in Appendix C, pp. 41–42, *infra*.

laws may in some cases throw light upon the proper construction of internal revenue laws. See *Seeberger* v. *Castro*, 153 U. S. 32.

But Congress has not adopted a consistent policy of making a sharp distinction between "candy" on the one hand and "chocolate" on the other. The word "candy" does not appear alone in a single one of the Acts referred to by the respondent in the suit below. The duties prescribed by these earlier Acts are usually laid upon "sugar candy," and generally, as in the Tariff Acts of 1909, 1913, and 1922, the phrase is "sugar candy, and all confectionery not specially provided for in this Section." By another paragraph in the same section a duty is laid on the importation of "chocolate." Of course, when chocolate is specifically provided for, it is not covered by the paragraph laying a duty on "sugar candy, and all confectionery not specially provided for in this section." That was the holding in *Arthur* v. *Stephani*, 96 U. S. 125. Where Congress in a Tariff Act uses two terms in classifying property subject to duty, one general and the other specific, articles answering the specific description will be subject to the duty imposed by the specific language, although they might well have been subject to the duty imposed by the general language had the specific language not been incorporated in the Act. Thus, in *Arthur* v. *Stephani, supra*, this Court said that the case—

> presents the question whether the articles are dutiable under general terms which may

> embrace them, or under that specific language which can be applied to nothing else. That the latter is the rule by which the duty is fixed is too well settled to require argument.

This principle has been applied in various cases arising under the customs laws which were cited by the respondents in the court below. These cases held that sweet milk chocolate is properly classified as chocolate under a Tariff Act containing a general provision levying duties upon "sugar candy, and all confectionery not specifically provided for in this section" and a specific paragraph levying duties upon "chocolate." *In re Austin*, 47 Fed. 873 (C. C. S. D. N. Y.); *In re Schilling*, 53 Fed. 81 (C. C. A. 2d), aff'g, 48 Fed. 547 (C. C. S. D. N. Y.); *United States* v. *McLaughlin & Freeman*, 13 Ct. Cust. App. 404.

But it does not follow that if chocolate had not been specifically mentioned it would not have been subject to the duty laid by the more general paragraph taxing "sugar candy, and all confectionery not specially provided for in this section." In *Forbes Lithograph Co.* v. *Worthington*, 132 U. S. 655, the question was whether certain iron show cards were dutiable as "manufactures of iron" or as "printed matter." This Court said (p. 661):

> "If a duty had been imposed on iron show cards *eo nomine*, the latter would not have been dutiable as "manufactures of iron," any more than "braces and suspenders,"

though made of rubber, were dutiable as "manufactures of rubber," *Arthur* v. *Davies*, 96 U. S. 135, or "artificial flowers," though made of cotton, were dutiable as "manufactures of cotton." *Arthur* v. *Rheims*, 96 U. S. 143. The specific designation would prevail over the general words which otherwise embraced the article.

In Sections 900 of the Revenue Acts of 1918 and 1921 Congress has *not* used two terms, one general and the other specific, both applicable to sweet-milk chocolate, and the question is not under which of two applicable descriptions an article comes. If Congress had used two such terms, no doubt the decisions under the earlier tariff laws would be applicable. Instead, one general comprehensive word—"candy"—was used, and if it does not include the articles in question, their sale was subject to no tax at all.

Furthermore, the purposes sought to be achieved by the Tariff Acts were different from those sought through the excise taxes imposed by the Revenue Acts of 1918 and 1921. Both types of acts are, of course, designed to produce revenue. But the Tariff Acts are also designed to protect industry. In such an act it is natural that sugar and chocolate should be classified separately. Some sugar is produced in the United States; chocolate is not. The purpose of the excise taxes in the Revenue Acts of 1918 and 1921 was to provide revenue by taxing luxuries. Thus, in the report of the Committee on Ways and

Means to the House (House Report No. 767, 65th Congress, 2d Session, p. 33) it was said:

> In recommending excise taxes in the proposed bill your committee has endeavored to select articles that fall within two classes: (1) Articles that are more or less a luxury because of their nature and (2) articles that become in the nature of a luxury when sold for more than a fixed price. The purpose of the committee in recommending these taxes is twofold: (1) To provide revenue and (2) to reduce extravagance.

See also *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, 45, *supra*; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, certiorari denied, 280 U. S. 579. Sweet milk chocolate put up for sale as a confection, such as is involved in this case, is, we submit, as much a luxury as other kinds of candy. There is no reason why "chocolate caramels" and "chocolate creams" should be taxed and sweet chocolate should not.

IV

THE CIRCULARS OF THE DEPARTMENT OF AGRICULTURE THROW NO LIGHT UPON THE MEANING OF THE WORD "CANDY" IN THE REVENUE ACTS OF 1918 AND 1921

The respondents contended in the courts below that the proper construction of the word "candy," as used in the Revenue Acts of 1918 and 1921, was to be found in the classification of milk chocolate and sweet milk chocolate made by the Secretary of Agriculture in certain circulars entitled "Standards of Purity for Food Products." In these circulars the Department of Agriculture has classified

milk chocolate and sweet milk chocolate under "tea, coffee, and cocoa products," while "candy" is classified under "sugar and related substances."[14] Neither the District Court (R. 21) nor the Circuit Court of Appeals (R. 98) considered these classifications as in any way controlling on the issue in these cases.

These circulars were promulgated under the Act of June 3, 1902, c. 985, 32 Stat. 286, 296, and later statutes supplementary thereto. This Act made an appropriation "to enable the Secretary of Agriculture * * * to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice." The definitions made in the circulars

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[14] The circulars referred to are as follows:

Circular No. 10, issued by the Department of Agriculture on November 20, 1903, entitled "Standards of Purity for Food Products";

Circular No. 13, issued by the Department of Agriculture on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture on March 9, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 186 issued by the Department of Agriculture on May 14, 1919, entitled "Standards of Purity for Food Products";

"Food Inspection Decision 165 (generally known as 'F. I. D.')," issued by the Secretary of Agriculture, February 15, 1916; and food inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

issued under this Act are consequently made for the purpose of establishing standards of purity in foodstuffs, and the classifications made are directed solely to that end. There is no indication whatever in the statute that the Secretary of Agriculture should have power to define what is or is not "candy" for any purpose, and the Revenue Acts contain no reference to the circulars of the Secretary of Agriculture.

CONCLUSION

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed.

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MARCH, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTES

REVENUE ACT OF 1918, c. 18, 40 STAT. 1057, 1122

TITLE IX. EXCISE TAXES

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records

REVENUE ACT OF 1921, c. 136, 42 STAT. 227, 291

TITLE IX. EXCISE TAXES

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(4) Cameras, weighing not more than 100 pounds, and lenses for such cameras, 10 per centum;

(5) Photographic films and plates (other than moving-picture films), 5 per centum;

(6) Candy, 3 per centum;

(7) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, 10 per centum;

(8) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes, if sold for more than $15, 10 per centum; and

(21) Toilet soap and toilet-soap powders, 8 per centum;

(9) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

(10) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(11) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(12) Liveries and livery boots and hats, 10 per centum;

(13) Hunting and shooting garments and riding habits, 10 per centum;

(14) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes, if sold for more than $100, 10 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 900 of the Revenue Act of 1918, be in lieu of such tax.

Section 1309 of the Revenue Act of 1918 is as follows:

> SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act. * * *

Section 1303 of the Revenue Act of 1921 is similar.

REGULATIONS

Article 22 of Regulations 47, "Relating to the Excise Taxes on Sales by the Manufacturer," issued May 1, 1919, under the Revenue Act of 1918, is as follows:

> Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, popcorn and other cereals or cereal products mixed with or cov-

ered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruits or nuts; and all similar articles, however designated. It does not include, however, cereal breakfast foods, cake, and pastries, nor bitter chocolate, which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits, at the time the goods are shipped or sold (whichever is prior), has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture, the tax attaches only to such portion of the goods sold as have been manufactured by him.

These regulations were revised in December, 1920, to read as follows:

ART. 22. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified

in paragraph (b) of this subdivision; popcorn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In

such cases, if the sale is billed, the container and candy must be billed as separate items.

Article 19 of Regulations 47, issued January 6, 1922, under the Revenue Act of 1921, provides:

ART. 19. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies, plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims; sweetened licorice; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glace, or candied fruit peel and citron, or sweet chocolate, glace, or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will

not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.

APPENDIX B

LETTER OF TRANSMITTAL ACCOMPANYING "NOTES ON THE REVENUE ACT OF 1918"

THE SECRETARY OF THE TREASURY,
Washington, November 3, 1919.

MY DEAR MR. FORDNEY: In the course of interpreting the war-revenue act of 1918 and framing appropriate regulations a number of suggestions for the amendment of the law have occurred to the various officers of the Internal Revenue Bureau. These suggestions have been recorded and associated with similar suggestions received from outside sources for further consideration, and I am sending you herewith a set of this material (as Part I of the attached compilation) in response to your request of September 23, 1919, in which you announced that the Committee on Ways and Means will soon undertake a study of the internal-revenue legislation.

This material is not in the form of recommendations by the department, as a decision has not yet been reached with respect to all of the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them.

When the department has had sufficient time to study, in the light of further administrative experience, all the suggestions which have been assembled and such additional suggestions as may occur to the officers of the department, I shall be

pleased to cooperate with the committee in the complete analysis of the law and the legislative requirements, as well as to detail to the committee the experts of the department who have had occasion to give personal study and attention to this matter.

In further compliance with your request of September 23, 1919, I have had a digest prepared of the decisions of the United States courts (arranged in accordance with the subject matter) under the internal-revenue acts from 1909 to 1919, both inclusive, which is inclosed herewith as Part II of the attached compilation.

Sincerely, yours,

CARTER GLASS.

Hon. JOSEPH W. FORDNEY,
Chairman Committee on Ways and Means, House of Representatives.

Appendix C

Citations of Tariff and Revenue Laws

Tariff Act of August 10, 1790, c. 39, 1 Stat. 180.

Tariff Act of May 2, 1792, c. 27, 1 Stat. 259.

Tariff Act of June 7, 1794, c. 54, 1 Stat. 390.

Tariff Act of March 3, 1797, c. 10, 1 Stat. 503.

Tariff Act of March 2, 1799, c. 22, 1 Stat. 627.

Tariff Act of May 13, 1800, c. 66, 2 Stat. 84.

Tariff Act of April 27, 1816, c. 107, 3 Stat. 310.

Tariff Act of May 22, 1824, c. 136, 4 Stat. 25.

Tariff Act of July 14, 1832, c. 227, 4 Stat. 583.

Tariff Act of August 30, 1842, c. 270, 5 Stat. 548.

Tariff Act of July 30, 1846, c. 74, 9 Stat. 42.

Tariff Act of March 2, 1861, c. 68, 12 Stat. 178.

Tariff Act of August 5, 1861, c. 45, 12 Stat. 292.

Tariff Act of December 24, 1861, c. 2, 12 Stat. 330.

War Revenue Act of 1862, July 1, 1862, c. 119, 12 Stat. 432.

Tariff Act of July 14, 1862, c. 163, 12 Stat. 543.

War Revenue Act of 1863 (March 3, 1863), c. 74, 12 Stat. 713.

Tariff Act of June 30, 1864, c. 171, 13 Stat. 202.

War Revenue Act of 1864 (June 30, 1864), c. 173, 13 Stat. 223.

War Revenue Act of 1866 (July 13, 1866), c. 184, 14 Stat. 98.

Combined Tariff and War Revenue Act of July 14, 1870, c. 255, 16 Stat. 256.

Tariff Act of June 6, 1872, c. 315, 17 Stat. 230.

Combination of War Revenue and Tariff Acts of March 3, 1883, c. 121, 22 Stat. 488.

Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567.

Tariff Act of August 27, 1894, c. 349, 28 Stat. 509.

Tariff Act of July 24, 1897, c. 11, 30 Stat. 151.

Tariff Act of August 5, 1909, c. 6, 36 Stat. 11.

Tariff Act of July 26, 1911, c. 3, 37 Stat. 4.

Tariff Act of October 3, 1913, c. 16, 38 Stat. 114.

APPENDIX D

MALLEY, COLLECTOR, ETC., *v.* WALTER BAKER & CO., LIMITED

(Circuit Court of Appeals, First Circuit. May 17, 1922)

No. 1547
281 Fed. 41

Before BINGHAM, JOHNSON, and ANDERSON, *Circuit Judges.*

ANDERSON, *Circuit Judge:* The ultimate question in this case is whether all, or any, of the sweet chocolate manufactured and sold by the defendant in error, herein called the plaintiff, is subject to a 5 per cent. excise tax as candy, under the provisions of title 9, § 900, of the Revenue Act of 1918 (40 Stat. 1122), and the regulations made by the Commissioner of Internal Revenue under authority granted by this act.

Between February 24 and August 31, 1919, the plaintiff made sales of such chocolate aggregating $635,137.30, and under protest paid the 5 per cent. tax thereon, amounting, with interest to December 5, 1921, to $35,232.25. Suit to recover this tax came on for trial before the District Court with a jury. After much evidence on both sides had been taken, much of it having little or no bearing on the real issue, the court below found and ruled that the word "candy" had no special trade significance, different from its meaning in ordinary speech; that

the regulations of the Commissioner hereinafter set forth were invalid, as an attempt to extend the natural meaning of the language of the statute; that chocolate is an independent substance, used directly for food, and, though used in the manufacture of candy, is not candy, within the meaning of this tax act; and ordered a verdict for the plaintiff in the full amount claimed. The case comes here on writ of error.

The Revenue Act, supra, provides:

> There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages for the prices so sold or leased: * * * (9) * * * Candy, 5 per centum.

The Commissioner of Internal Revenue, under the usual grant of power found in such statutes, promulgated regulations duly approved on May 1, 1919, by the Secretary of the Treasury. Article 22 of these regulations is as follows:

> *Candy.*—Candy, within the meaning of the act, includes *chocolate creams*, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, *chocolate-covered fruits*, and nuts, glacé or candied fruits and nuts, popcorn and other cereals and cereal products mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, *sweet chocolate and*

sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated. It does not, however, include cereal breakfast foods, cake and pastries, *nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.* If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. . Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portion of the goods sold as have been manufactured by him. (Particularly pertinent words we have italicized.)

On May 10, 1919, the Commissioner ruled as follows:

> Sweet chocolate sold in parcels of such size and shape that it is commonly purchased and consumed as candy by the general public is taxable as candy, but sweet chocolate sold in large packages not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes.

This ruling applies to sweet chocolate the exemption procedure applicable under the regulation, *supra*, to glacé and candied fruits.

Article 22 of the Regulations was revised in December, 1920, so that, while still covering affimatively "sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts," it by the addition of paragraph (b) excluded—

> sweet chocolate, glacé or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold.

The Commissioner, on January 25, 1921, in response to inquiry from the plaintiff, applied in detail the regulation to the plaintiff's business, as disclosed, and also ruled that—

> Upon the submission of evidence from the taxpayer, claims already rejected will be reopened and allowed in the amount representing tax paid on products herein held not taxable. Action on pending claims will be held in abeyance for further evidence.

It thus appears that, even after suit brought, the department was ready to entertain claims for taxes paid on sweet chocolate "sold for use in a form other than that in which it is sold by the manufacturer."

In the plaintiff's declaration it admitted in each of the five counts—referring to the certificate called for by the ruling of May 10, 1919, *supra*—that it had "no such certificates with respect to the chocolate upon the sale of which the tax was assessed,

and says that it was impossible for the purchaser to determine at the time of the sale of such chocolate whether it would be used for further manufacture or not." The record does not support this allegation of the impossibility of obtaining such certificates. No reason is apparent why in much, if not all, of the business such certificates could not have been obtained. But this was not made the exclusive method of distinguishing sweet chocolates intended for consumption, as such, from sweet chocolate intended as a food ingredient; any reasonable method of showing the determinative facts was available to this plaintiff.

At the trial it was agreed that—

> An analysis of the various brands of chocolate upon which the tax in suit was paid would show the following percentages of sugar:
>
> Between 60 and 65 per cent in Caracas chocolate.
>
> Between 50 and 55 per cent in German's chocolate.
>
> Between 50 and 55 per cent in Century and Vanilla chocolate.
>
> Between 30 and 35 per cent in Dot chocolate.
>
> Between 50 and 55 per cent in Eagle chocolate.

It was also agreed that an annexed schedule showed the sales of the various brands from February 24 to April 30, 1919. Sales for the months of May to August, inclusive, were shown only in the aggregate. Assuming, as we fairly may, that the schedule for February, March, and April is fairly typical of the whole period of about 7 months, it is clear that about half of the sales in question

consisted of the Caracas sweet chocolate, which contains from 60 to 65 per cent of sugar, and that the sales of the Dot chocolate, containing only from 30 to 35 per cent of sugar, were not more than about 10 per cent of the aggregate. All the other brands contained from 50 to 55 per cent of sugar. The necessary inference, therefore, is that the sweet chocolates sold, taken as a mass, were considerably more than half sugar.

It is matter of common knowledge, and the evidence and numerous exhibits also show, that this sweet chocolate is manufactured in cakes and bars, adapted for consumption as candy, packed in convenient cartons for sale as candy, advertised as "delicious for eating," or "excellent as a confection," and sold in large quantities over the candy counters, and consumed, at least in substantial part, in the form put out by the manufacturer for such consumption. Plainly, it is a mixture, about half and half, of sugar and chocolate, sometimes with flavoring material like vanilla, and in the form in which it is put up and marketed intended to cater to the same tastes and to appeal to the same class of consumers as are chocolate bonbons (barely distinguishable in composition) and other well-known forms of candy or confectionery. Sugar, "the appeal to the sweet tooth," is, of course, the basic ingredient in all candy. Sweet chocolate is a most toothsome form of sugar compound.

Not indented

Plaintiff's chief contention is that this sweet-chocolate product is, in its entirety, food, and not candy, within the fair meaning of the act. This view was adopted by the District Judge, who held it all exempt from the tax, denying the defendant's request to

submit to the jury an issue "as to the proportion of the total sales of each exhibit which was used for domestic or cooking purposes."

We think this was error. We construe the statute as the Commissioner construed it. While, as it is a tax statute, reasonable doubts must be resolved in favor of the taxpayer, we can see no such reasonable doubts as to the legislative intent to tax such products as sweet chocolate when manufactured, and sold for consumption in the form sold, and not for cooking or domestic purposes.

Not indented

Revenue Acts are not penal statutes. See *Cliquot's Champagne*, 3 Wall. 114, 145, where the court said:

> Revenue laws are not penal laws, in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the Legislature in passing them, and most effectually accomplish these objects.

To the same effect is the case of *United States* v. *Hodson*, 10 Wall. 395, 406, where Mr. Justice Swayne said:

> Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment.

The Circuit Court of Appeals for the Third Circuit, in *Carbon Steel* v. *Lewellyn*, 258 Fed. 533, 534, stated the rule as follows:

> In ascertaining the true construction of the law, and thus carrying out its purpose, this court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing, and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done.

See also same case, 251 U. S. 501; *Worth Brothers* v. *Lederer*, 251 U. S. 507; *Baltimore Talking Board Co., Inc.*, v. *Miles* (D. C.), 273 Fed. 531; *Citizens Bank* v. *Parker*, 192 U. S. 73; *American Security Co.* v. *District of Columbia*, 224 U. S. 491.

Looking at the statute as a whole, it is clear that Congress, impelled by the expenses of the World War, intended to lay a pretty heavy tax on luxuries as distinguished from necessaries. Candy, manufactured and consumed in tremendous quantities, because of the well-known and extraordinary American appetite for sweets, was regarded as a luxury.

But this sweet-chocolate product consists, as already noted, more than half of sugar. Sugar is far more important as a food element than is chocolate. Sugar is admittedly the basic ingredient of candy. To hold, as the court below held, that sweet chocolate is not candy, because chocolate is also food, falls logically little short of holding that candy is not candy because sugar is also food. Nuts and practically all the other ingredients of candy, except perhaps some of the flavoring materials, are also food. We can not agree with the court below that sweet chocolate is not candy simply because made up about half and half of chocolate and sugar, each of which is a food. Some other test must be

found. Sugar compounds are admittedly candy, when manufactured, advertised, sold, and consumed as candy, and not as a food ingredient. The distinction turns, not so much on the composition of the article, as on the way or form in which it is sold, and upon the use made of it by its purchasers.

We think the court below erred in holding invalid this distinction made by the Commissioner as to sweet chocolate. The plaintiff's contention, in effect adopted by the District Court, that the tax was on the product—sweet chocolate—and applicable to *all* or to *none* of it, is untenable. The use or destination of the product may well have been made by Congress the basis of classification for taxing purposes. Coal and diamonds are chemically much alike; practically and for tax purposes they are radically different. We think the test applied by the Commissioner was consonant with the statute. Apart from the weight given department rulings and regulations in such cases, our construction of the act conforms to that of the Commissioner; it seems to us fairly plain.

But it is elementary that, if ambiguity is found in a statute, or when it is necessary to determine a fact upon which the operation of a statute is made to depend, the regulations made by the department charged with the administration of the act are to be given great, sometimes practically controlling, weight. See *Edwards, Lessee,* v. *Darby,* 12 Wheat. 206, 212; *Houghton* v. *Payne,* 194 U. S. 88, 96; *Komada* v. *United States,* 215 U. S. 392; *Jacobs* v. *Prichard,* 223 U. S. 200, 214; *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165; *Coopersville Co-op. Creamery Co.* v. *Lemon,* 163 Fed.

145; *United States* v. *Healey*, 160 U. S. 136, 141; *Robertson* v. *Downing*, 127 U. S. 607, 613; *Cf. Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349, where the court, by Mr. Justice Clarke, said:

> It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law, if it be not in conflict with express statutory provisions. (Citing *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Birdsall*, 233 U. S. 233, 251; *United States* v. *Smull*, 236 U. S. 405, 409, 411; *United States* v. *Morehead*, 243 U. S. 607.)

It comes to this: Congress intended that various compounds of sugar and other ingredients, practically all of which are also food ingredients, should, when compounded, sold, and consumed as candy, a luxury, be subjected to this tax. The distinction undertaken to be made by the department that sweet chocolate should be taxed when put up and sold in such form as to indicate that it was to be consumed as candy is consumed, and not taxed when it was obvious from the packing or other circumstances surrounding the transaction that it was to be merely an ingredient for further manufacture is a sound distinction. At any rate, unless this distinction is made, it is difficult to see how candy can be taxed at all; for, as already stated, candy is in its main characteristics sugar compounds, intended for luxury, taste-gratifying, consumption. When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy com-

pounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy.

The eighteenth assignment of error brings before us the refusal of the court below to submit to the jury the question of what proportion of the sweet chocolate in question was used for cooking or domestic purposes. This assignment must be sustained. The burden of proof is on the plaintiff to show that the taxes collected were illegal or the assessments excessive. *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322; *New York Life Ins. Co.* v. *Anderson* (C. C. A.), 263 Fed. 527, 530; *Germantown Trust Co.* v. *Lederer* (C. C. A.), 263 Fed. 672; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 638; *Black, Fed. Cases*, § 547; *Schafer* v. *Craft, Collector* (D. C.), 144 Fed. 907, 909; *South Pacific* v. *Lowe, Collector* (D. C.), 238 Fed. 847, 849; *Cohen* v. *Lowe, Collector* (D. C.), 234 Fed. 474, 476.

The plaintiff is not entitled to recover more than the amount that it can show it paid as a tax on such portions of the product in question as were not sold and used as candy within the meaning of the Department's regulation.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers costs in this court.

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FILE COPY

Nos. 426—441.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

B. D. McCaughn, Collector, v. Hershey Chocolate Co.
Est. E. Lederer, Collector, v. Hershey Chocolate Co.
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Est. B. F. Davis, Collector, v. York Chocolate Co.
Est. E. Lederer, Collector, v. York Chocolate Co.
B. D. McCaughn, Collector, v. York Chocolate Co.

IN RE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN E. SNYDER,
Hershey, Pa.
F. LYMAN WINDOLPH,
Lancaster, Pa.
C. J. HEPBURN,
Philadelphia, Pa.
S. V. HOSTERMAN,
Lancaster, Pa.
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IN RE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS CONTRA PETITION FOR WRITS OF CERTIORARI.

JURISDICTION.

The Respondents, while conceding the jurisdiction of this Court to review the questions decided by the Circuit Court of Appeals for the Third Circuit on writs of *certiorari* filed by the Government, assert that for the reasons hereafter set forth the petitions should be denied because there is no such conflict with any decision of other Circuit Courts of Appeal and no such continuing question of general public interest as the Government asserts; and that the questions which control the decision of these cases have been heretofore adjudicated conclusively by the decisions of this Court.

QUESTION PRESENTED.

The controlling question is whether the Congress of the United States by the provisions of Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 imposing an excise tax on "candy" intended thereby to impose this tax upon sweet chocolate and sweet milk chocolate.

ARGUMENT.

The excise taxes imposed by the Revenue Act of 1918 and the Revenue Act of 1921 have been repealed, and therefore the decision of the question involved in these cases controls a very limited number of cases, most of which are covered by the petitions under consideration.

The decision of the Circuit Court of Appeals in these cases is not in conflict with either Malley *v.* Walter Baker & Co., 281 Fed. 41, nor Cracker Jack Co. *v.* United States, 67 C. Cls. 89, 280 U. S. 579, for the reason that the controlling facts which are in these records, now before the Court, are different from the facts which controlled those decisions, relied upon by the Petitioner.

Not only is there no conflict in the decision of the Cir-

cuit Court of Appeals for the Third Circuit in these cases, on questions of law, with decisions of other Circuit Courts of Appeal, but it is made clear by a reading of the opinion of Judge Avis for the Circuit Court of Appeals in these cases that the judgments are controlled by the applicable decisions of this Court cited in that opinion.

The question which was decided in the judgments complained of in these cases was whether an excise tax imposed by Acts of Congress upon "candy" *eo nomine* may be lawfully assessed by the Treasury Department upon sweet chocolate and sweet milk chocolate.

The Government asserts that it is entitled to retain the taxes collected from these Respondents because the Commissioner of Internal Revenue had power to extend by classifying regulations the tax imposed by the statutes upon "candy" to sweet chocolate and sweet milk chocolate, even though these products were omitted by Congress from the articles upon which the excise taxes were imposed.

The decisions of this Court seem to deny to the Treasury Department of the United States such power of levying taxes, and these have been followed by the learned Judges of the Court below in reaching the conclusions which the Government attacks in the pending petitions.

Judge Avis, speaking for the Court (Record, pp. 150, 152, 153) says:

> "We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.
>
> "In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy generally called 'sugar candy,' and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and

taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

"The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.

"The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in Congressional enactments or by executive regulation, included in the term 'candy,' is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

"The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate *eo nomine*, notwithstanding the fact that the regulations of the Commissioner, classifying both as 'candy,' under the 1918 act, and that the District Court decision in Massachusetts holding that they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

"It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts."

* * * * * * *

"In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the Committee a definition of the word 'candy,' which included sweet chocolate

and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases."

* * * * * * *

"In both the revenue acts of 1918 and 1921, the authority of the Commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"'That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act.'

"It will be noted in this statute, that it provides for 'rules and regulations' which shall be 'for the enforcement of the provisions of this act.'

"The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the Commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute."

* * * * * * *

"Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining 'candy,' afterward promulgated by the Commissioner